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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DOVERWOOD TOWNHOME OWNERS ASSOCIATION, Plaintiff and Appellant, v. HUGH S. McMULLEN, Defendant and Respondent.	B149685 (Los Angeles County Super. Ct. No. SC064332)

APPEAL from orders of the Superior Court of Los Angeles County. Laurence D. Rubin, Judge. Affirmed.

Don H. Haycock for Plaintiff and Appellant.

Timothy G. Dallinger for Defendant and Respondent.

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Appellant Doverwood Townhome Owners Association ("Doverwood") appeals the January 15, 2001 voluntary dismissal of its action with prejudice under Code of Civil Procedure[1] section 473, the trial court's order of December 15, 2000 awarding sanctions in favor of respondent Hugh S. McMullen, and the trial court's March 15, 2001 order awarding attorney fees as costs in the amount of $44,185.33 and costs of $190.30 in favor of McMullen. Finding no abuse of discretion in the trial court's award of attorney fees and costs, we affirm. In addition, given Doverwood's failure to assert any cognizable legal argument with respect to the appeal of the dismissal under section 473, we deem that issue abandoned (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115); we further conclude the trial court's December 15, 2000 sanction order is not subject to appellate review based on Doverwood's voluntary dismissal of the action. (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1342.)

FACTUAL AND PROCEDURAL BACKGROUND

Doverwood's complaint, filed November 8, 1999, alleged causes of action for breach of contract, fraudulent transfer, and quiet title against McMullen, based on McMullen's failure to pay homeowner association fees on his condominium. Prior to McMullen's appearance in the action, a private trustee sale of McMullen's condominium was conducted on January 18, 2000. The sale resulted in a surplus and Doverwood collected all sums due from McMullen. Nevertheless, Doverwood continued the litigation for another year with the stated purpose of ferreting out alleged fraudulent transfers and related matters.

On December 15, 2000, the trial court ruled on cross-discovery motions and awarded discovery sanctions against Doverwood and its attorney in favor of McMullen in the amount of $1,875. A month later, on January 12, 2001, Doverwood

voluntarily dismissed the action with prejudice. On February 1, 2001 McMullen filed an application for attorney fees allowable as costs under sections 1032, 1033.5, and Civil Code section 1354. Doverwood opposed the fee application and filed its own motion for attorney fees on February 22, 2001. Neither party requested or noticed a hearing on the fee applications.

On March 8, 2001 Doverwood filed the first of three notices of appeal in the case ("Appeal I").

On March 15, 2001, the date set for a hearing on McMullen's motion to disburse the funds from the trustee's sale, the court issued a tentative ruling reflecting its intent to grant McMullen's attorney fee application as well as to disburse the surplus sale proceeds to McMullen.[2] The court granted McMullen's fee application, ordering Doverwood to pay statutory attorney fees of $44,185.33 to McMullen as the prevailing party pursuant to Civil Code section 1354 and section 1033.5 subdivision (a)(10)(B), and out-of-pocket costs in the sum of $190.30 pursuant to section 1033.5 subdivision (a).[3]

Thereafter, on March 26, 2001, the trial court denied Doverwood's motion to amend its "dismissal with prejudice" to a "dismissal without prejudice." Doverwood withdrew Appeal I on March 30, 2001. It then filed the second notice of appeal in the case—"Appeal II"—the instant appeal on April 18, 2001, seeking review of the March 15, 2001 order for attorney fees, and again challenging its own voluntary

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[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] The surplus from the sale of McMullen's condominium had been deposited with the court clerk in conjunction with a separate case filed by the trustee to determine the proper distribution of the surplus. (Civ. Code, § 2924j.) The same attorney who represents Doverwood in this case also represented the trustee in that action.

[3] Doverwood's counsel checked in with the court clerk prior to the hearing, but when the case was called he was not in the courtroom and could not be located.

dismissal of the action under section 473, and the December 15, 2000 imposition of sanctions.[4]

Doverwood also filed three ex parte applications in rapid succession. Expressing concern that significant issues were being litigated ex parte, the court set a hearing on the issues raised by the ex parte applications on May 11, 2001. On May 24, 2001 the court issued its ruling denying reconsideration of the award of attorney fees and granting a partial stay of execution pending appeal. Subsequently, the court denied Doverwood's motion for reconsideration of the May 24, 2001 order, and imposed sanctions in the amount of $1,925 against Doverwood's attorney.

Doverwood then filed its third notice of appeal on July 20, 2001 ("Appeal III"), which this court ordered dismissed on January 23, 2002 on McMullen's motion.

APPEALABILITY AND STANDARD OF REVIEW

Although Doverwood devotes a significant portion of its opening brief to challenging the trial court's orders of May 24, 2001 and July 12, 2001, these rulings occurred after Doverwood's April 18, 2001 notice of appeal, and are therefore irrelevant to this appeal. Moreover, these rulings were specifically the subject of Appeal III, which has already been dismissed.

Doverwood also purports to appeal its own voluntary dismissal of the action under section 473. But the dismissal is not appealable. "While a compulsory dismissal by order of a court is a judicial act from which a plaintiff may appeal, a voluntary dismissal by a plaintiff is accomplished by a ministerial act of the clerk, filing from which no appeal lies." (*Yancey v. Fink*, *supra*, 226 Cal.App.3d at pp. 1342-1343; *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal.App.3d 116, 120.)

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[4] Appeal II is presently before this court subject to a motion to dismiss, which was filed by McMullen on June 6, 2001. We deferred ruling on the motion to dismiss until the matter was on calendar.

In addition, Doverwood has altogether failed to address the issue of denial of relief from the voluntary dismissal under section 473. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711.) Accordingly, we deem this issue abandoned.

Doverwood is also not entitled to review of the trial court's December 15, 2000 sanction award, since that order predated Doverwood's voluntary dismissal of the action with prejudice. "'[T]here is no kinship of a voluntary dismissal to a final judgment. A willful dismissal terminates the action for all time and affords the appellate court no jurisdiction to review rulings on . . . motions made prior to the dismissal.' [Citation.]" (*Yancey v. Fink, supra*, 226 Cal.App.3d at p. 1343.) Since no appeal lies from interlocutory orders preceding the dismissal, Doverwood is barred from challenging the trial court's December 15, 2000 sanction order.

The only issue subject to appellate review in this appeal is the propriety of the trial court's March 15, 2001 order awarding attorney fees and costs. Such orders are collateral to the main action and separately appealable: "'When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, *and directing [the] payment of money or performance of an act*, direct appeal may be taken.' [Citation.]" (*Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235.) We review the trial court's award of attorney fees for abuse of discretion, and will not disturb it on appeal absent a clear abuse of that discretion. (*Donald v. Café Royale, Inc.* (1990) 218 Cal.App.3d 168, 185; *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.)

DISCUSSION

The Trial Court Did Not Abuse Its Discretion in Awarding Attorney Fees As Costs to McMullen.

Doverwood contends that the trial court abused its discretion in awarding attorney fees and costs in its March 15, 2001 order because (1) McMullen's motion for attorney fees and costs was untimely; (2) the order was based on Judge Rubin's misinterpretation and misapplication of *Heather Farms Homeowners Assn. v. Robinson, supra*, 21 Cal.App.4th 1568; and (3) no attorney fees were available under Civil Code section 1354 because count 1 of the complaint had been rendered moot. Doverwood's contentions are without merit.

Civil Code section 1354 provides for the recovery of attorney fees in an action to enforce covenants and restrictions in condominium and other community development projects. (Civ. Code, § 1354, subd. (f); *Heather Farms Homeowners Assn. v. Robinson, supra*, 21 Cal.App.4th at p. 1571.) Doverwood expressly filed its action under Civil Code sections 1350 through 1376, and the first cause of action alleged breach of contract for failure to pay the condominium assessment fees as required by the Doverwood Townhome Owners Association conditions, covenants and restrictions ("CC&Rs"). Specifically, Doverwood alleged the CC&Rs provided that delinquent assessments would become a debt of the townhome owner and owed to Doverwood.

McMullen filed his application for attorney fees and costs under section 1033.5 and Civil Code section 1354 within 20 days of Doverwood's dismissal of the action with prejudice.[5] Doverwood asserts that Civil Code section 1354, subdivision (f) does not authorize an award of attorney fees on the *application* of a party, but requires a

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[5] Thereafter, on March 12, 2001 McMullen filed a separate motion for attorney fees under sections 1032, 1033.5 and Civil Code section 1354. This motion incorporated the application for attorney fees, and was taken off calendar after the court issued its March 15, 2001 ruling.

motion in order for attorney fees to be awarded to the prevailing party. Doverwood cites no authority for this proposition, and its argument finds no support in the plain language of the statute, which does not address the specific mechanism for seeking attorney fees at all.[6] On the other hand, section 1033.5 expressly authorizes a party seeking attorney fees to do so either by application *or* motion. (§ 1033.5, subd. (c)(5)(A), (C).) McMullen's application (as well as his motion), filed within three weeks of Doverwood's dismissal of the action, was timely and proper. (See Cal. Rules of Court, rule 870.2.)

In determining who was the "prevailing party" entitled to an award of attorney fees under Civil Code section 1354, subdivision (f), the trial court employed the practical approach set forth in *Heather Farms Homeowners Assn. v. Robinson, supra*, 21 Cal.App.4th 1568, and properly concluded that McMullen was the prevailing party in this case.

In *Heather Farms*, the court confronted the very question at issue here: whether the definition of prevailing party under Civil Code section 1354 should be governed by Civil Code section 1717, under which there is no prevailing party when the complaint has been voluntarily dismissed, or by section 1032, subdivision (a)(4), under which the prevailing party may be a defendant in whose favor a dismissal has been entered. The court concluded that rigid application of either definition was unwarranted in a case under Civil Code section 1354, subdivision (f), and adopted the approach applied by the courts in *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, *Donald v. Cafe Royale, Inc., supra*, 218 Cal.App.3d 168, and *Elster*

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[6] Civil Code section 1354, subdivision (f) provides: "In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action."

v. Friedman (1989) 211 Cal.App.3d 1439, analyzing "which party had prevailed on a practical level." (*Heather Farms, supra*, 21 Cal.App.4th at p. 1574.)

In this case, the trial court applied the *Heather Farms* analysis, and concluded that it was McMullen who had prevailed "on a practical level," thereby entitling him to an award of attorney fees.[7] The trial court reasoned: "At the foundation of [Doverwood's] argument that either it or no one is the prevailing party is the assertion that [Doverwood] achieved what it wanted in this litigation when it arranged for the trustee to sell [McMullen's] condominium for nonpayment of delinquent fees. . . . [Doverwood] reasons that since there was a judicial foreclosure that resulted in a surplus of funds after [Doverwood] recovered the amounts owed to it, [Doverwood] prevailed in the case, or at least [McMullen] did not prevail. The fault in that reasoning is that Civil Code [section] 2924 is not the *judicial* foreclosure statute, it is the *nonjudicial* foreclosure statute. (See 3 Witkin, Summary of California Law (9th ed. 1988) Security Transactions in Real Property, § 129 et seq.) There was no judicial foreclosure sale here; rather, it was a trustee's sale under the terms of the CC&Rs. [Doverwood] did not seek judicial foreclosure as a remedy in its complaint. Indeed, prior to the time [McMullen] filed his answer in this case, the property had already been sold privately. Three days after [McMullen] filed his answer, the trustee, represented by the same counsel who represents [Doverwood] here, filed its application in SP004402 for an order for the distribution of the surplus funds and actually deposited $8748.03 into court. . . .

"From that point on, [Doverwood], who had recovered all that it was owed through the trustee's sale, had no claims that it could lawfully pursue against [McMullen] since it had suffered no uncompensated damages. The claim for quiet

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[7] The trial court's reasoning in granting McMullen's application for attorney fees is set forth in its May 24, 2001 ruling, which is not before us in this appeal. We refer to it only to illuminate the basis for the trial court's determination that McMullen was entitled to attorney fees under sections 1032, 1033.5 and Civil Code section 1354.

title relief was also illusory because title had vested in the buyers of the property following the trustee sale." (Fn. omitted.)

"[Doverwood] pursued this action under some theory that it could root out the grantees of fraudulent transfers, even though only Mr. McMullen and no Does were named as defendants. [Doverwood's] counsel further stated he pursued the litigation to learn the identity of someone who had threatened the trustee with litigation. [Doverwood's] counsel also stated that he pursued the litigation in order to conduct discovery in this case on whether third persons might have a claim to the surplus of funds held by the court in SP004402. . . . Such an effort was not related to this litigation. [¶] Based on the foregoing and the totality of the circumstances of this case, the court finds and concludes that [McMullen] was the prevailing party under both [section] 1032 (a)(4) and the principles expressed in *Heather Farms*."

For the most part, Doverwood advances the same arguments on appeal that the trial court considered and rejected below, and Doverwood's challenges to the award of attorney fees have not improved with repetition. We will not disturb the trial court's conclusion absent an abuse of discretion, and Doverwood has failed to establish any basis for concluding that the trial court misapplied *Heather Farms*, or otherwise abused its discretion in finding McMullen was the prevailing party under sections 1032, 1033.5, and Civil Code section 1354.

Doverwood's reliance on *Donald v. Café Royale, Inc., supra*, 218 Cal.App.3d 168 to further contend that McMullen could not be the prevailing party because the first cause of action was rendered "moot" by the trustee's sale is misplaced. In *Donald*, the defendant rendered plaintiff's action for an injunction moot by going out of business pendente lite. The court held, "[u]nder these circumstances, it was an abuse of discretion for the court to determine that by going out of business and rendering the issue moot, [defendant] 'prevailed' for purposes of attorney fees." (*Donald v. Café Royale, Inc., supra*, 218 Cal.App.3d at p. 185.)

By sharp contrast, in the present case, Doverwood rendered its own claim moot by conducting the trustee's sale and recovering all the money owed to it before McMullen even appeared in the action. Doverwood's institution of its lawsuit thus had nothing to do with the recovery of McMullen's debt, and the "mootness" of Doverwood's claim was due to Doverwood's, not McMullen's, conduct. *Donald* is thus clearly distinguishable, and the trial court did not abuse its discretion in determining that McMullen was the "prevailing party" in this case.

DISPOSITION

The trial court's award of attorney fees and costs in its order of March 15, 2001 is affirmed. Doverwood is ordered to bear McMullen's costs and attorney fees on appeal.

NOT FOR PUBLICATION.

_____, J.

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We concur:

_____, Acting P.J.

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_____, J.

ASHMANN-GERST